Supreme Court, U.S.
FILED

(2) 09-443 AUG 29 2009

OFFICE OF THE CLERK
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES A. BUCK, JR

Petitioner,

v.

INTERNAL REVENUE SERVICE

Respondent(s).

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit
Office Of The Clerk
St. Louis, MO. 63102

PETITION FOR WRIT OF CERTIORARI - APPENDIX

JAMES A. BUCK, JR., - *Pro Se*
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-3559

James A. Buck, Jr.,

Appellant,

v.

Internal Revenue Service

Appellee

Appeal from the United States District Court for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: May 7, 2009
Filed: May 13, 2009

Before WOLLMAN, MURPHY, AND MELLOY, Circuit judges.

PER CURIAM.

James A. Buck, Jr., appeals the district court's[1] adverse grant of summary judgment in his employment-discrimination and wrongful-discharge suit against his former employer, the Internal Revenue Service. Having carefully reviewed the district court and administrative records and considered Buck's arguments, we find no basis for reversal. See Crawford v. Runyon, 37 F.3d 1338, 1340 (8thCir. 1994)(in case where plaintiff challenges Merit Services Protection Board (MSPD) decision and asserts claims under title VII, appellate court reviews MSPD decision on administrative record and Title VII claim de novo.) Accordingly, we affirm. See 8th Cir. R. 47B.

[1] The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3559

James A. buck, Jr.,

Plaintiff - Apellant

v.

Internal Revenue Service,

Defendant - Appellee

Appeal from U.S. District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 13, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

Case: 07-3559 Page:1 Date Filed:06/26/2009 Entry ID:3561083

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No.:07-3559

James A. Buck, Jr.,

Appellant

v.

Internal Revenue Service,

Appellee

Appeal from U. S. District Court for the Eastern District of Missouri -- St. Louis (4:06-cv-01285-ERW)

ORDER

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

June 26, 2009

Order Entered at the Direction of the Court:
Clerk, U. S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES A. BUCK, JR.,

Plaintiff(s),

vs

Case No. 4-06CV01285 ERW

HENRY M. PAULSON, SECRETARY, DEPARTMENT OF TREASURY,

Defendant (s)

JUDGMENT

In accordance with the Memorandum and Order entered on this date and incorporated herein.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT Defendant Henry M. Paulson shall have judgment against Plaintiff James A. Buck, Jr., on all counts of plaintiff's Complaint. All counts of Plaintiff's Complaint are **DISMISSED with prejudice.**

Dated this 10th day of October, 2007.

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES A. BUCK, JR.,	)	
	)	
Plaintiff(s),	)	
	)	
	)	
vs.	)	Case No. 4:06CV01285
	)	ERW
INTERNAL REVENUE	)	
SERVICE, et al.,	)	
	)	
Defendant(s).	)	

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment [doc. #7].

I. BACKGROUND FACTS[2]

[2] [#1 in actual document] The Court's recitation of the facts is taken from Defendant's Statement of Uncontroverted Material Facts and Plaintiff's Statement of Material Facts, as well as the responses filed to each.

Plaintiff James A. Buck, Jr. ("Plaintiff") was formerly employed by the Internal Revenue Service who is the Defendant in this case, through Henry M. Paulson, the Secretary of Department of the Treasury ("Defendant"). Plaintiff was employed by the Small Business Self Employed ("SBSE") division during the relevant time period. While in this position Plaintiff filed three EEOC complaints alleging discrimination on the basis of race and sex, for the failure of the SBSE to select Plaintiff for the Revenue Agent Grade 13 position. These were filed on June 13, 2003, February 14, 2004, and March 29, 2004.

Plaintiff was managed by Joseph Folk ("Mr. Folk"), from March 2002 through February 28, 2005. Mr. Folk issued Plaintiff's yearly evaluations for 2003 and 2004. Mr. Folk also had numerous discussions with Plaintiff, throughout this time period, during which he expressed concerns regarding the low number of cases Plaintiff had active, management of his cases, and work efficiency. These are memorialized in a number of Employee Performance Folder Record ("EPFR") Evaluations. On February 22, 2005, Mr. Folk issued a Performance Improvement Plan ("PIP") for Plaintiff, due to Plaintiff's failure to meet two Critical Job Elements ("CJE"). Following the issuance of the PIP, an Opportunity to Improve Letter was Issued. On February 28, 2005, Danielle Douglass ("Ms. Douglass") was assigned as Plaintiff's new manager.

During the PIP period, Plaintiff was also assigned Kelvin Jackson, a senior tax agent, as a mentor.

Notwithstanding the aid Plaintiff was given, Plaintiff was deemed to have failed the PIP, and on Sept. 7, 2007, Victoria Gally, Plaintiffs' second level supervisor, proposed Plaintiff's removal. The final determination was made by Faris Fink, Director, Examination-Midwest, Ms. Gally's superior. Plaintiff was given an opportunity to respond to Ms. Gally's proposal through both a written and oral reply; Plaintiff took advantage of both opportunities. On January 3, 2006 Fink determined that the charges by Ms. Gally of unacceptable performance were sustained. On January 5, 2006, Plaintiff applied for discontinued service retirement, and Plaintiff was separated from the Agency. On January 6, 2006 Plaintiff appealed the action before the Merit Systems Protection Board ("MSPB"), where Administrative Law Judge Stephen Manrose affirmed the Agency's action.

II. PROCEDURAL HISTORY

Plaintiff filed this lawsuit against Henry M. Paulson, Secretary of the Department of Treasury, and the Internal Revenue service, on August 25, 2006, challenging his removal from the Internal Revenue Service ("the Agency"). Plaintiff has challenged the Agency's action on the basis that the Merit Service Protection Board's Decision to uphold

Plaintiff's removal was improper, and on the basis that it was discriminatory. On August 8, 2007, Defendant filed the pending Motion for Summary Judgment. The case is set for a jury trial on November 5, 2007. The Court will now address the pending motion.

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment only if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Citrate*, 477 U.S. 317, 322 (1986). The United States Supreme Court has noted that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.' " *Id.* at 327 (quoting Fed. R. Civ. P. 1). "By its terms [Rule 56(c)(1)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material facts are those "that might affect the outcome of the suit under the governing law," and a genuine

material fact is one such that "a reasonable jury could return a verdict for the nonmoving party." *Id.* Further, if the non-moving party has failed to "make a showing sufficient to establish the existence of an element essential to that party's case,...there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23.

The initial burden of proof in a motion for summary judgment is placed on the moving party to establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). Once this burden is discharged, if the record does in fact bear out that no genuine dispute exists, the burden then shifts to the non-moving party who must set forth affirmative evidence and specific facts showing there is a genuine dispute on that issue. *Anderson*, 477 U.S. at 249. When the burden shifts,the non-moving party may not rest on the allegations in its pleadings, but by affidavit and other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R. Div.P. 56(e); *Stone Motor Co. v. Gen. Motors Corp.*, 293 F.3d 456, 465 (8th cir. 2002). To meet its burden, the non-moving party must "do more than simply show there is some metaphysical doubt as to the material; facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In fact, the non-moving

party must show there is sufficient evidence favoring the non-moving party which would enable a jury to return a verdict for it. *Anderson*, 477 U.S. at 249; *Celotex*, 477 U.S. at 324. "If the non-moving party fails to produce such evidence, summary judgment is proper." *Olson v. Pennzoil Co.*, 943 F.2d 881, 883 (8th Cir. 1991).

IV. DISCUSSION

Plaintiff raises three distinct claims in his complaint. First, Plaintiff alleges that the Merit Service Protection Board's Decision to uphold Plaintiff's removal was improper as it was not based on substantial evidence. Secondly, Plaintiff alleges that he was removed beause of his race, in violation of federal law. Thirdly, Plaintiff alleges that he was removed because of his race, in violation of federal law. Thirdly, Plaintiff alleges that he was removed in retaliation for filing numerous Equal Employment Opportunity Commission ("EEOC") complaints. The Court will address each allegation in turn.

A. Merit Service Protection Board's Decision

The MSPB determined that the decision to remove Plaintiff from employment was proper due to Plaintiff's unacceptable job performance. Plaintiff disputes that this decision was proper, arguing that the evidence does not support such a finding. Defendant argues that the evidence does support

such a finding, and that the court has limited review of the MSPB's decision.

The United States Code provides for judicial review of the MSPB's decision. 5 U.S.C. § 7703(a)(1)("Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.") Generally, a decision is appealed directly to the Federal Circuit Court of Appeals, however, in cases alleging discrimination, the case may be heard before a district court. 5 U.S.C. § 7703(b)(1) & (2). The statute provides that:

> the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence ...

5 U.S.C. § 7703 (c)(1)-(3). "Judicial review of MSPB decisions is narrow in scope. We will affirm rational decisions to dismiss federal employees if applicable procedures were followed and substantial evidence supports the MSPB's determination." *Jones v. Farm Credit Administration*, 702 F.2d 160, 162 (8th Cir.

1983); *see also Romero v. Department of the Army*, 708 F.2d 1561,1563 (10th Cir. 1983). . In a case involving both discrimination and nondiscrimination claims, "[t]he district court reviews the discrimination claim de novo and the nondiscrimination claim on the administrative record under 5 U.S.C. § 7703(c)." *Mason v. Frank*, 32 F.3d 315, 317 (8th Cir. 1994).

The statute requires that the MSPB's decision be supported by substantial evidence. 5 U.S.C. § 7703(c)(3). The Supreme Court has described substantial evidence as "more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 217 (1938); *see also Ratliff v. Jefferson Pilot Financial Ins. Co.*, 489 F.3d 343, 346 (8th Cir. 2007) ("Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal citations omitted)); *see also King v. Hartford Life and Accident Insurance Co.*, 414 F.3d 994, 999 (8th Cir. 2005).

Using the standard articulated above, the Court concludes that the MSPB's decision was supported by substantial evidence. Plaintiff's immediate supervisor, Mr. Folk, repeatedly observed problems with Plaintiff's performance as early as 2002. Mr. Folk also repeatedly advised Plaintiff of specific areas in which Plaintiff needed to improve his performance in order to perform his job adequately . When Ms. Douglas took over Plaintiff's

supervision, she also noted problems with Plaintiff's performance. Each of Plaintiff's yearly reviews articulated a number of areas in which the Plaintiff's performance was considered unacceptable. The record before the Court shows that Plaintiff was given numerous opportunities to improve his performance, and failed to do so. He was placed on a

Performance Improvement Plan, during which time he was provided additional assistance in working his cases and was provided with a senior employee to serve as his mentor. Notwithstanding this assistance, Plaintiff's performance failed to improve. The United States code requires that an agency provide a performance appraisal system, which establishes performance standards on the basis of objective criteria, through which an employee can be evaluated. 5 U.S.C. § 4302(b)(1)-(3). This code section further provides, that an agency may "remov[e] employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance." 5 U.S.C. § 4302(b)(6). The Plaintiff was given this opportunity, and yet his performance failed to improve. the MSPB's determination is supported by substantial evidence, therefore its decision is upheld, and Defendant is entitled to Summary Judgment on this claim.

B. Discrimination

Plaintiff also asserts that he was removed because of his race, and in retaliation for filing complaints with the EEOC. The Court will address each allegation. As an initial matter, the Court notes that claims alleging discrimination, unlike claims alleging improper action by the MSPB, are reviewed *do novo*. 5 U.S.C. § 7703(c); *See also Mason*, 32 F.3d at 317. "[I]n the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court." 5 U.S.C. § 7703(c).

1. Race

Plaintiff argues that he was treated differently than a similarly situated white employee, and therefore that he has provided evidence of a prima facie case of race discrimination. Plaintiff asserts that there is sufficient evidence to support a jury finding in his favor, and therefore summary judgment is inappropriate. Defendant disputes Plaintiff's assertions on a number of bases. The Court will address each element required to support a claim of discrimination.

The Supreme Court in *McDonnell Douglas Corporation v. Green*, set forth a three part evidentiary inquiry to be used in addressing cases of

disparate treatment discrimination. 411 U.S. 792 (1973). [3] The first burden is placed on the complainant to establish a prima facie case of race discrimination. *Id.* at 802. The burden then shifts to the employer to articulate a nondiscriminatory reason for the employer's employment decision. *Id.* If the employer is able to articulate a nondiscriminatory reason, then the burden shifts back to the employee to show that the reason was pretextual. *Id.* at 807. In order to establish a prima facie case of discrimination, the Plaintiff must show that "(1) he is a member of a protected class, (2) that he was meeting the employer's legitimate job expections, (3) that he suffered an adverse employment action, ad (4) that similarly situated employees outside the protected class were treated differently." *Tolen v. Ashcroft*, 377 F.3d 879, 882 (8th Cir. 2004).

The Court finds that the Plaintiff has provided evidence which establishes a prima facie case of discrimination. Plaintiff is an African American, and was removed from employment, satisfying the first and third requirements of a prima facie case. The evidence is clear that the Plaintiff was not meeting his employer's legitimate expectations at the time of his removal. However, the Plaintiff has provided evidence of a similarly situated employee,

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[3] [#2 in actual document] The burden-shifting framework articulated *in McDonnell Douglas Corporation* is applicable to those cases which do not contain direct evidence of discrimination. The Plaintiff has not presented any evidence which directly establishes discrimination, and therefore the burden-shifting framework is applicable.

who was also not meeting the legitimate expectations of his employer, who was treated more favorably than Plaintiff. Plaintiff has provided evidence of a white employee, Mr. Leeker, who was not removed. Mr. Leeker was employed in the same department as Plaintiff, reported to the same supervisor, and received negative performance reviews. Additionally, Mr. Leeker was placed on a PIP, which he failed to complete. However, unlike Plaintiff, Mr. Leeker was not terminated, but rather was reassigned to the money-laundering group, with which he had prior experience. In establishing a prima facie case, the Plaintiff "has the burden of demonstrating that there were individuals similarly situated in all relevant aspects ([him] by a preponderance of the evidence." *Clark v. Runyon*, 218 F.3d 915, 918. "Specifically, the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing factors." *Id.* Plaintiff has satisfied this burden. Mr. Leeker's situation was substantially similar to Plaintiff's, and unlike Plaintiff, Mr Leeker was reassigned rather than terminated. Defendant's attempts to distinguish the two employees are unpersuasive.

Since Plaintiff has provided evidence of a prima facie case, the burden shifts to the Defendant to show a nondiscriminatory reason for the employment decision. *McDonnell Douglas Corp.*, 411 U.S. at 802. In this case, Defendant has stated that Plaintiff was not qualified to perform the

position. This is supported by the evidence, and therefore satisfies Defendant's burden.

The last step in the analysis shifts the burden back to Plaintiff to provide evidence, sufficient to support a jury finding in his favor, that Defendant's proffered reason for removal was pretextual. *McDonnell Douglas Corp.,* 411 U.S. at 807. Planitiff is unable to meet this burden. There is substantial evidence in the record to show that Plaintiff was unable to perform the requirements of his position within the agency. the evidence is also undisputed that Plaintiff's supervisors gave him numerous opportunities to improve his performance. The fact that Mr. Leeker was reassigned is not sufficient to show that the proffered reason for Plaintiff's removal was pretext. defendant was under no obligation to provide Plaintiff with an alternate position when he was unable to perform the duties of his current position. Therefore, Plaintiff's race discrimination claim is dismissed.

2. Reprisal

Plaintiff's final allegation is that he was terminated because ho filed three EEOC complaints against members of the Agency. The same framework is used, however, the requirements for establishing a prim facie case are distinct. *See equal Employment Opportunity Commission v. Kohler Co.*, 335 F.3d 766, 772 (8th Cir. 2003). In order to establish a prim facie case for retaliatory discharge, the Plaintiff must show that: "(1) he engaged in statutorily protected activity; (2) he suffered an adverse employment

action; and (3) there was a causal connection between the adverse employment action and the protected activity." Id. The burden-shifting approach then applies as articulated above. Id. at 773; *see also Gilooly v. Missouri department of Health and Senior Services*, 421 F.3d 734, 739 (8th cir. 2005) ("The defense may rebut a plaintiff's claim by advancing a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant can show a legitimate reason, the plaintiff must show that the given reason was only a pretext for discrimination." (internal quotation omitted)).

The first two elements of Plaintiff's prima facie case are easily satisfied. Plaintiff engaged in statutorily protected activity, filing a complaint with the EEOC, and suffered an adverse employment action, removal. the key inquiry is whether Plaintiff has provided evidence of a causal connection between the three EEOC complaint, and his removal. There were individuals that were mainly involved in the decision to remove Plaintiff from employment. His two immediate supervisors, Mr. Folk and Ms. Douglas, and his second level supervisor, Ms. Gally. Neither of Plaintiff's immediate supervisors were named in the EEOC complaints, although they were aware that Plaintiff had filed the complaints. Ms. Gally, was named as the selecting official in one of Plaintiff's complaint.[4] All three of Plaintiff's

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[4] [#3 in actual document] Defendant disputes that Mr. Folk knowledge of Plaintiff's EEOC complaints. However, there is sufficient evidence to support a jury finding that he was aware of them, and therefore the court assumes this to be true for purposes of the pending motion for summary judgment.

complaints before the EEOC related to the Agency's failure to select Plaintiff for a Revenue Agent Grade 13 position.[5] Plaintiff three complaints were dated June 13, 2003, February 18, 2004, and March 29, 2004. Ms. Gally recommended that Plaintiff be removed for unacceptable performance on September 7, 2005, and this decision became final on January 6, 2006.

"To prove a causal connection under the third element, a plaintiff must prove that na emplyer's retaliatory motive played a part in the adverse employment action." *Gilooly*, 421 F.3d at 739. However, direct evidence is not required, rather "evidence that gives rise to an inference of retaliatory motive... is sufficient to prove a causal connection." *Id.* at 739-740 (quoting *Kipp v. Missouri Highway & Transportation Commission*, 280 F.3d 893-97 (8th Cir. 2002). although direct evidence is not required, "more than a temporal connection is required to present a genuine factual issue on retaliation." *Kipp*, 280 F.3d at 897 (internal citation omitted). The Eighth Circuit further held in *Kipp* that "the interval of two months between the complaint and Ms. Kipp's termination so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in Ms. Kipp's favor onh the matter of a causal link." *Id.*

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[5] [#4 in actual document] Plaintiff was a Revenue Agent Grade 12 position.

In the case at bar, Plaintiff has not presented the court with any evidence of a causal connection. The only evidence provided is that Ms. Gally was named in one of the EEOC complaints, ant that Plaintiff's two immediate supervisors knew about the complaints. This does not show any retaliatory motive, nor does it give rise to an inference of a retaliatory motive. Futhermore, there is no temporal connection between Plaintiff's EEOC complaints, and his removal. The recommendation that Plaintiff be removed was made seventeen months after his last complaint. Therefore , the Court concluded that Plaintiff cannot establish a prima facie case of retaliatory discrimination, and Defendant is entitled to summary judgment.

V. CONCLUSION

The Court concludes that Plaintiff has not presented a genuine issue of material fact regarding his race and reprisal discrimination claims against the Agency. Plaintiff was unable to adequately perform the required functions of his job, and therefore it was within the Agency's discretion to remove Plaintiff from employment. The Court recognizes that while the agency could have placed Plaintiff in a different position, they were not obligated to do so. Furthermore, the Court finds that the MSPB's determination, that Plaintiff's removal was the appropriate response to Plaintiff's inadequate performance, is supported by substantial evidence. Therefore, Defendant's Motion for Summary Judgment is granted.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment [doc. #7] is **GRANTED**.

Dated this 10th Day of October, 2007.

E. RICHARD WEBBER
UNITEN STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES A. BUCK, JR.
Appellant,
v.

DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBER
CH-0432-06-0273-I-1

DATE: August 15, 2006

Alvin E. Buck, Esquire, Franklin, Tennessee, for the appellant.

Aaron J. Bennett, Esquire, and Erin E. Timmons, Esquire, Dallas, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge.

We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. section 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. section 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge if final. This is the Board's final decision in this matter. 5 C.F.R. section 1201.113.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. section 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other claims: Judicial Action

If you do note request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. section 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national original, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. section 2000e5(f); 29 U.S.C. section 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discriminiation claims, but you do want to request review of the Board's decision without regard to you discrimination claims, you may request the Untied States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. section 7703), You may read this law, as will

as review the Board's regulations and other related material, at our website, http://www.mspb.gov.

Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which us cibtaubed within he court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C,

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

Certified Mailed	Alvin E. Buck, Esq. 744 Glen Oaks Drive Franklin, TN 37067
U.S. Mail	James A. Buck, Jr. 12570 Danube Drive Florissant, MO. 63033
U.S. Mail	Aaron J. Bennett, Esq. Department of the Treasury Internal Revenue Service General Legal Services 4050 Alpha Road, 14th Floor MS 2500 MSR Dallas, TX 75244-4203
U.S. Mail	Erin E. Timmons, Esq. Department of the Treasury Internal Revenue Service Dallas Area Counsel (General Legal Services) 4050 Alpha Road, 14th Floor Room 1430 MS 2500 MSRO

Dallas, TX 75244-4203

August 15, 2006
Date

Marie A. Warcholak
Legal Assistant

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION
BOARD
CENTRAL REGIONAL OFFICE

JAMES A. BUCK, JR.,
Appellant,

v.

DEPARTMENT OF THE
TREASURY,
Agency

DOCKET NUMBER
CH-0432-06-0273-I-1

DATE: May 15, 2006

Alvin E. Buck, Esquire, Franklin, Tennessee, for the appellant.

Aaron J. Bennett, Esquire, and Erin E. Timmons, Esquire, Dallas, Texas, for the agency.

BEFORE
Stephen E. Manrose
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed a timely appeal from an action separating him on January 6, 2006 from the position of Revenue Agent with the Department of Treasury, Internal Revenue service, Earth City, Missouri.[6] I held a hearing on April 29, 2006.

The appeal falls within the Board's appellate jurisdiction. *See* 5 U.S.C.A. § 4303(e)(West 1996); 5 C.F.R. § 432.106(a)(2006). For the reasons stated below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Burdens of Proof -- In order for a performance-based action to be sustained, the agency must prove several matters by substantial evidence.[7] It must show that the performance standards used to evaluate the appellant's performance are valid. *See Burnett v. Department of Health and Human Services*, 51 M.S.P.R. 615, 617 (1991). It must also prove that the appellant's performance in the critical

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[6] [#1 in actual document] The appellant requested he be provided with a discontinued service retirement effective the date of his removal (Record, Tab 8, Agency /Exhibit 17).

[7] [#2 in actual document] Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1)(2005).

elements at issue was unacceptable in that he failed to meet the established performance standards. 5 C.F.R. § 4301(3) and 4303(a)(West 1996). In cases where the agency has established unacceptable performance on less than all of the components of a performance standard, the agency must present substantial evidence that the appellant's performance warranted an unacceptable rating on the critical element as a whole. See *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 628 (1984). If the agency proves unacceptable performance, it must show that, before taking the action, the appellant was afforded a reasonable opportunity to improve his performance to an acceptable level. See 5 U.S.C.A. § 4302(b))(6)(West 1996); *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 586-87 (1994). The appellant has the burden of proving any affirmative defenses by preponderant evidence.[8]

The agency's action was taken under valid performance standards. The appellant's performance was evaluated as unacceptable in two critical elements of her position, elements II andV.

Element II, titled "Customer Satisfaction-Knowledge," contains three components, two of which are at issue. The agency alleges the appellant

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[8] [#3 in actual document] Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would adept as sufficient to find that a contested fact is more likely true than untrue. 5 C. F.R. § 1201.56(c)(2)(2005).

rendered unacceptable performance under component 2A -- "Tax Laws" and component 2C -- "Tax and Accounting Principles."

The performance standards under critical element II define employee performance that provides taxpayers and customers with technical expertise while providing professional helpful service. Accurate identification and resolution of issues as well as correct interpretation of laws, rules, and regulations as well as other information sources are identified as key components of the critical element. The applicable performance standard under component A required the appellant to display a working knowledge of tax laws and research tools to independently conduct relevant research and to "appropriately" conduct research using sources such as the Tax Code and Regulations, court cases and rulings to resolve issues and complete assignments thoroughly and accurately. The performance standard under component C defined acceptable performance as that which demonstrates a working knowledge of tax and financial accounting principles needed to understand, reconcile, and analyze customers' books, records, and financial statements. In addition, the appellant was required to identify and resolve issues or areas where compliance was questionable or lacking, and he was required to recognize and evaluate "indicators of fraud" (Agency Response File: Tab 4j).

Critical element V, titled "business results-efficiency," has three components, and the agency alleges the appellant provided unacceptable performance under each component. Component 5A,

"completes work timely," required the appellant, to meet an acceptable level of performance, to "generally" complete his work assignments so that the time spent and the length over which his work was completed was "commensurate with the nature and complexity of the work." Component 5B, "prioritizes work," required the appellant to prioritize, plan, and schedule his work in a logical and timely manner, spend time on his work in the order of priority of the work, and follow necessary procedures to protect the applicable statute of limitations. Component 5C, "gathers information and develops facts," required the appellant to use appropriate analytical resources and fact finding or innovative techniques to gather and develop facts that are logical, understandable, and logically presented. In addition, it required the appellant to interpret and follow applicable procedures, standards and guidelines (Tab 4j).

An agency is required to establish standards that, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria. *See Neal v. Defense Logistics Agency*, 72 M.S.P.R. 158, 161 (1996), *citing Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 353 (1992), *reh'g* denied, 58 M.S.P.R. 259 (1993)(Table), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994)(Table). An agency may give content to performance standards by informing the employee of work requirements through specific instructions, information concerning deficiencies and methods of improving performance, memoranda describing

unacceptable performance, and responses to the employee's questions concerning performance. *Id.*

Danielle Douglass, Supervisory Internal Revenue Agent, provided testimony regarding the critical elements involved in this case. She testified that revenue agents are generally required to examine taxpayers and tax returns and issue reports on the taxes owed. It was therefore necessary for the appellant, under element II, to know pertinent tax laws and regulations and to conduct research and analyze issue. Regarding element V, she noted that tax audits should be completed as efficiently and within as brief a time as reasonably possible and that certain priority cases, including those involving a statute of limitations, should be identified and processed accordingly.

On February 22, 2005, Joseph N. Folk, Manager, Group 9, issued an Opportunity to Improve notice. It advised the appellant that he was failing to provide acceptable performance in element II, components 2A and 2C, and element V, components 5A, 5B, and 5C. It provided him with specific examples of his deficiencies in failing to meet the standards. In giving content to the plain language of the standards, Mr.Folk's February 22 warning notice establishes it was the appellant's pervasive failure to gather and identify facts as well as identify, analyze, and resolve tax issues in a timely and efficient manner, with appropriate priority placed on the work that would be evaluated during the opportunity period. Ms. Douglas testified she worked with the appellant throughout the notice period in an attempt to improve his performance and, further, she

assigned a senior tax agent to mentor the appellant. She also twice extended the opportunity period to allow additional time for examination of the appellant's work (Tabs 4f and h).

I find the performance standards reasonably provided the appellant with the definition of the performance necessary to achieve acceptable performance under the critical elements at issue. To the extent necessary, supervisory discussions with the appellant, as well as the February 22 opportunity notice, gave "content" to the standards and element, thus providing the appellant with further guidance regarding the level of work necessary to achieve acceptable performance under the standards and element. Although the standards required a certain degree of subjective judgment on the part of the appellant's supervisors, individuals such as the appellant, who are employed in professional positions, may be evaluated under subjective criteria when their performance cannot be quantified under a mechanical rating system. *See Neal v. Defense Logistics Agency*, 72 M.S..P.R. at 162. The appellant does not contest on appeal the appropriateness of the performance standards and elements.

I find, in summary, the agency hasproven by substantial evidence the validity of the critical elements II and V and the accompanying pertinent performance standards.

Substantial evidence establishes the appellant's failure to meet the requirements of performance standards 2A and 2C.

Component 2a is supported by four specifications. Specification 1 references the tax returns of Taxpayers A and B. The appellant allegedly determined that these taxpayers were married but Taxpayer A filed as a single taxpayer and Taxpayer B filed as head of household while claiming a substantial earned income tax credit. The appellant allegedly failed to recognize the law regarding married taxpayers and the earned income tax credit and did not initiate an examination on Taxpayer B.

Ms. Douglass testified the appellant failed to recognize the tax laws regarding these returns. She stated that married taxpayers often file as single individuals or head of household, and the appellant should have recognized this fact and initiated an examination of the return of Taxpayer B, who claimed head of household status with an earned income tax credit. In addition, the appellant should have adjusted Taxpayer A's tax return (Record, Tab 8, Agency Exhibit 4, p.1) reflects he claimed his filing status as "single." Ms. Douglass's note to the appellant dated May 6, 2005 (Agency Response File: Tax 4d-1-1) reflects it was necessary for her to advise the appellant to "pick up wife" for inquiry (Taxpayer B).

The appellant did not specifically respond to this specification, or the other specifications at issue in this case, in his testimony. In his response to the proposed removal notice, he stated he brought the issue to his supervisor's attention and that "it [was] certainly not clear [the appellant] considered this

only at the manager's urging" (Agency Response File: Tab 4c, p.2).

A reasonable person might conclude this issue was not identified by the appellant and that he only initiated the examination of Taxpayer B upon the urging of his supervisor. In addition, the factual circumstances stated in the specification reflect negatively on the appellant's ability to demonstrate a fundamental technical knowledge of tax laws by identification of a significant issue regarding Taxpayers A and B. I therefore find the specification is supported by substantial evidence.

The second specification alleges the appellant failed to display a working knowledge of the deductibility of expenses. The appellant failed to recognize, in the case of Taxpayer C, that the taxpayer was not entitled to deduct mortgage payments that his daughter was making.

Ms. Douglass testified in support of the specification, noting that because the taxpayer's daughter was making mortgage payments on the house, the taxpayer was not entitled to deduct the mortgage interest. In the appellant's oral response to the charges, he stated he recognized the taxpayer was unable to "deduct amounts that they did not pay" and that he made an adjustment for the portion not paid by the taxpayer (Record, Tab 8, Exhibit 1, p.8).

Although the workpapers submitted on appeal do not specifically show whether the appellant or Ms. Douglas identified the issue in dispute and adjusted

the tax due (Agency Response File: Tab d-1-2; Record, Tab 8, Exhibit 6), Ms.Douglass stated in her closed case review (Tab 4d-1-7) that it was necessary for her to explain to the appellant that taxpayers are not able to deduct money they do not spend. Based on Ms. Douglass's identification of this issue, the appellant apparently made any necessary modifications to his workpapers. In addition, Ms. Douglass provided testimony regarding this matter while the appellant merely made a contrary argument during his reply to the charge. The fact that the adjustment was necessary, and it concerns a fundamental principle of tax law, is established by this record. I find a reasonable person could find the evidence supporting this specification to be adequate to support the allegation made in the specification. Accordingly, the specification is supported by substantial evidence.

Specification 3 alleges the appellant failed to display a working knowledge of tax laws regarding shareholder dividends in the case of Taxpayer D. The appellant allegedly closed the case and stated in his workpapers that a couple of large payments to the shareholders were salary payments," even though there was no indication what type of work the shareholders, who were not listed as officers of the company, performed.

Ms. Douglas testified that individuals often try to get money out of a company by reporting it as a deductible salary when in fact it may be a dividend. She stated there was no indication in the file that the individuals receiving these large payments

performed any work and the appellant did not recognize the issue that the payments made to them may have been dividends rather than salary payments.

In his reply, the appellant argues the shareholders worked 40 to 60 hours a week and, further, that "just because a payment is not a salary doesn't make it a dividend" (Record, Tab 8, Agency 1, p. 12).

The workpapers state the appellant's belief the individuals at issue worked 40-60 hours a week " conducting business," the general nature of which is described in the papers (Agency Response File: Tab 4d-1-3). Little specific information about their work is noted in the record, however. Certainly, it was beneficial for the shareholders to count the payments made to them as salary payments rather than as dividends in view of the deductibility of salary expenses. The appellant does not appear to recognize, based on a review of his reply, the significance of this issue. I therefore find the specification is supported by substantial evidence.

Specification 4 alleges the appellant failed to independently conduct "relevant research" in the case of Taxpayer M. Although the appellant's pre-audit of the taxpayer reflected that the taxpayer had two schedule C businesses and "some related entities," the case file reflected the appellant did not spend "adequate time" pre-auditing these items nor did he request IDRS research on related returns so he could consider all potential tax law issues.

Ms. Douglass stated that Taxpayer M worked in the construction industry. Notwithstanding this circumstance, nothing in the appellant's workpapers examined the nature of the construction industry. Moreover, the appellant looked at old information regarding the taxpayer and did not identify pertinent issues relating to the case.

In his reply, the appellant argues he does not have IDRS "access." He also contends that in the pre-audit phase of a case, "there's only so much that can be done" (Agency Exhibit 1, pp. 12-13).

The specific deficiencies regarding the appellant's performance are not evident based on my review of the testimony and documentation (Tabs 4d,-1-4; 4d-2-4; Agency Exhibit 11) and were not clarified by Ms. Douglass in her testimony. For this reason and based on the appellant's arguments in rebuttal, I find this specification is not supported by substantial evidence. It is therefore not sustained.

I find, in summary, that the agency has supported three of the four specifications under performance standard 2A. Because I find the sustained specifications supportive of the specification itself, I find the agency has proven the appellant's performance under this component of the rating system was unacceptable.

Component 2C is also supported by four specifications. The first supporting specification, Specification 5, failed to recognize, regarding Taxpayer D, that shareholder dividends is an area where "compliance is questionable or lacking." As

stated above in Specification 3, there were a couple of large salary payments to shareholders of the corporation even though there was no explanation of the duties performed to earn such salaries. Because the shareholders were not officers of the company, the amounts were "large, unusual, and questionable' and a compliance issue, not recognized by the appellant, was evident from the appellant's workpapers.

Ms. Douglass again testified that individuals involved with a company often prefer to take a salary rather than dividends because salaries are deductible and dividends are not. She stated that, in this case, the appellant filed to identify this large and questionable item for compliance review.

In his oral reply to this specification, the appellant's representative stated the shareholders were interviewed and the appellant found, "for some undisclosed reason," they were "not officers" of the company (Agency Exhibit 1, pp.14-15).

The same performance deficiencies found under component 2A are also present regarding this component. Here, however, as testified to be Ms.Douglass, these deficiencies evidence a failure to identify and resolve an issue where compliance with the tax code was questionable or appeared to be lacking. Moreover, the appellant, as reflected by the evidence, failed to recognize a potential issue of fraud in connection with this return. For these reasons, the actions taken with respect to this taxpayer fail to meet the applicable performance standards under

component 2C. The specification is therefore supported by substantial evidence.

Specification 6 alleges the appellant failed to demonstrate a working knowledge of financial accounting principles "needed to understand, reconcile and analyze customers' books and records or financial statements' in the case of Taxpayer H. The appellant allegedly failed to reconcile the purchases "per the books" to "purchases per the tax return." Specifically, he failed to reconcile a purchase figure of $9,952,632 on the return when the purchase figure "per the books" was $9,794,052.64, indicating that the purchases on the return were overstated by $158,579. The resulting understatement of net income represented a "material error."

Documentary evidence reflects a significant disparity between the purchases on Taxpayer H's tax return ($9,952,632) and "on the books" of $9,794,052.64) and that the appellant considered these figures to be "reconciled" (Tab 4d-1-6, Attachments 1 and 4 (p.7)). Ms. Douglass stated the numbers failed to match up, that there was no reconciliation, and that the appellant made an obvious error.

In his replies, the appellant stated the discrepancy was only approximately $75,000 and were therefore not material (Agency Exhibit 1, p.15; Record, Tab 9, Exhibit C2).

The appellant has admitted the numbers did not reconcile. Component 2C of the critical element required in part that he reconcile the tax return with

the customers' books, records, and financial statements. He failed to do so. The specification is therefore supported by substantial evidence.

Specification 7 also alleges the appellant failed to demonstrate a working knowledge of tax and financial accounting principles needed to understand and analyze customers' books, records, or financial statements in the case of Taxpayer C. During an initial interview with this taxpayer, the taxpayer stated he had refinanced his home but could not remember exactly when that occurred. The appellant failed to ask a follow-up question to determine the amount of cash Taxpayer C received from the home refinance, even though a comparative analysis completed by the appellant showed a "huge increase" in the amount of mortgage interest deducted in 2003 when compared to 2002, and the appellant's workpapers were "silent" regarding this matter. It was necessary for the appellant's supervisor to make note of the necessary follow-up questions for the taxpayer.

Ms. Douglas verified in her testimony that the taxpayer had reported a huge increase in mortgage interest deductions from year to year. She stated, however, that the appellant did not verify why this occurred. She stated it was necessary for her to intervene, whereupon she determined the taxpayer had purchased another house.

In his reply, the appellant denied all the allegations against him (Record, Tab 9, Exhibit C3). He stated he did ask follow-up questions about the money received from the refinancing of the house

and that his comparative analysis did show a huge increase in the mortgage interest paid from year to year.

As discussed above, documentation during the closed-case review reflects, as found above under Specification 2, that it was necessary for Ms. Douglass to explain the adjustment needed to made on the return for mortgage interest paid by someone other than Taxpayer C. In a workload review regarding this and other cases, Ms. Douglass stated the appellant did not inquire, at the first interview with the taxpayer, how much cash was made available based on the refinancing of the house ((Tab 4d-2-1, p.9). To the extent the appellant finally received this information, he apparently did so only during a subsequent contact with the taxpayer rather than during the first contact. Under this circumstance, he failed to provide acceptable performance as alleged. The specification is therefore supported by substantial evidence.

Specification 8 regards the case of taxpayer I. The appellant submitted the case for closing. One of the issues involved schedule E rental propery. Although the appellant's interview notes reflected that the taxpayer claimed 100% business use of the property even though gross receipts from the property were "minimal," the appellant "did not work this issue" nor did he "comment that he would not work the issue." It was therefore necessary to return the case to the appellant, whereupon he contacted the taxpayer who told him that about 50% of the building was not actually business use.

Ms. Douglass testified the tax return created doubt whether 100% of the business was used for business reasons. She stated the appellant did not properly analyze the issue and note that claimed personal expenses for the property were not deductible. Ms. Douglass noted in her closed-case review that the appellant did not address the issue of the rental property, even though the gross receipts were small. It was therefore necessary for her to return the case for "further development,' whereupon the appellant found that only half of the property was rented even though the taxpayer was deducting expenses on the entire property (Tab 4d-1-8).

In his reply, the appellant denied Ms. Douglass's allegations. He stated that he did identify and work the issue involved, even though the case had to be resubmitted for closing (Appellant's Exhibit C3). Documentary evidence pertaining to this case in the workload review, however, reflects that significant additional work had to be accomplished before the appellant could finish his work on the case (Tab 4d-2-12, p. 19)

The allegations within this specification are supported by the testimony of Ms. Douglass as well as her contemporaneously-recorded workload review. Although the appellant denies her allegations, he did not provide testimony regarding the matter and he admitted in his argument the case had to be resubmitted for review. The directive requiring more work reflects that significant work remained on the case. Under these circumstances, I find the

appellant did not adequately "work" the critical issue delineated in the specification. Because, under component 2C, the appellant was required to identify and analyze all records, I find the agency has supported this specification by substantial evidence.

The agency, in summary, has supported all four specifications under component 2C by substantial evidence. I find the sustained specifications are supportive of the allegation the appellant failed to provide acceptable performance under the component and that component 2C, therefore, is supported by substantial evidence.

Unacceptable performance has been shown for two of the three components under critical element II. As previously discussed, the agency must establish that the appellant's unacceptable performance on fewer than all of the components of the performance standard warrants an unacceptable rating on the critical element as a whole.

Ms. Douglass testified that acceptable performance on each component under the critical element element was essential for acceptable performance under the critical element as a whole. I find the appellant needed an understanding of tax laws (component 2A) and tax and accounting principles (component 2C) to renter acceptable performance under a critical element that requires revenue agents to have the technical expertise to serve customers by accurately identifying and resolving issues and correctly interpreting applicable laws, rules, and regulations. I therefore find that the

appellant's failure to provide acceptable performance in two of the three components of the critical element rendered his overall performance under Critical Element II unacceptable.

Substantial evidence establishes the appellant's failure to meet the requirements of performance standards 5A, 5B, and 5C.

Component 5A is supported by eight specifications. Specification 1 alleges the appellant "did not complete [his] work assignment so that both the total time spent and the time span of [his] activities were commensurate with the nature and complexity of the work." The specification concerns Taxpayer L. Although the appellant received information on this "return preparer project case" on March 7, 2005, he did not review the information until May 19, 2005.

Ms. Douglass confirmed in her testimony that the appellant received the necessary information to work on the case in March 2005, but that he did not review it until May 19, 2005, even though he was required to review it within fourteen days. She stated that, in addition, he was told a few times to review the information. She found there was no "significant activity" in the case for forty-five days.

In his replies, the appellant did not specifically deny the allegations contained in the specification. He stated he was working on other priority cases and, further, his March 31, 2005 workload review states he was working each case timely" (Appellant'sExhibit C3; Agency Exhibit 1, p. 20, 21; Tab 4d-2-1).

The fact that the March 31, 2005 workload review states the appellant was working certain named cases timely has no bearing on this specification because, even if case was one of those mentioned in the review, the issue is not whether case processing was timely as of March 31 but whether the appellant's action in failing to act by May 19, 2005 was appropriate. I find the specification is supported by substantial evidence.

Specification 2 alleges the appellant failed to identify an issue with "potentially significant compliance impact." This specification again references Taxpayer D and notes the company deducted large payments to shareholders that represented about 54% of the total return deductions. Notwithstanding this circumstance, the appellant did not identify the potential dividend issue in this case.

Ms. Douglass testified that any large, unusual, and questionable items in a return should be identified and evaluated. The appellant denied the agency's allegation (Appellant's Exhibit C3 and C4).

I have already found the appellant failed to properly identify the laws pertinent to this taxpayer and to analyze the issue of dividend as opposed to salary. By failing in these requirements of his position, he also failed to identify an issue that raised a significant compliance issue and did not utilize his time efficiently, as required under component 5A. The specification is therefore supported by substantial evidence.

Specification 3 alleges the appellant spent time on items of little "materiality" regarding Taxpayer J. During a review of this case with the appellant's manager, the scope of the case was expanded to include commissions expense because this expense was significant in nature. Although the appellant subsequently issued an examination report disallowing the commission expense, he included an adjustment for uniforms expense. Because the uniforms deduction was immaterial, less than 1% of total expenses, it did not have a significant compliance impact.

In her testimony, Ms. Douglass stated the appellant focused on expenses for uniforms, which was not the most important information at issue in the return. The appellant stated that he identified this potential issue, asked the taxpayer about it, and resolved it in less than ten minutes.

In view of the short time needed to resolve this issue, the agency has not proven unacceptable performance as alleged in the specification. The specification is therefore not sustained.

Specification 4 alleges inefficient work practices regarding Taxpayer M. The specification alleges the appellant spent an excessive amount of time in the pre-audit phase of this review, including several hours reviewing information that was not relevant. In addition, he allegedly failed to consider related return information.

As stated above, Taxpayer M worked in the construction industry. Ms. Douglass stated that

many items were not listed on the return and that the appellant should have, but did not, review prior tax returns when evaluating this taxpayer and his return. The appellant responded that he spent an appropriate amount of time to analyze the circumstances of this complex return (Appellant's Exhibit C4).

As discussed above in specification 4 under Critical Element 1, the specific circumstances of this case are not evident from the documentary record and Ms. Douglass's testimony. For this reason and because the appellant disputes the allegations contained in the specification, I find the specification is not supported by substantial evidence. It is therefore not sustained.

Specifications 5-7 allege inefficient work practices regarding Taxpayers N, O, and P. Although most of the case work had been completed before these cases were assigned to the appellant in January 2005 and all letters and examination reports had been prepared and mailed, the appellant failed to close the cases even though his manager told him to close them in April and May 2005. The specification alleges the cases sat "unnecessarily idle" for over 40 days.

Ms. Douglass testified that these cases were simple in nature but sat idle after she sent follow-up letters to the taxpayers and they did not respond. She stated she had to order the appellant to take action when all he had to do was complete one document to close them.

The appellant stated these cases got "lost/misplaced in their shuffle" and that when he discovered them, he immediately closed them (Appellant's Exhibit C4-6). He also contends he did not know the cases were assigned to him (Agency Exhibit 1, pp. 23-26)

Documentary evidence reflects the appellant was notified on or before April 20, 2005 that these cases were assigned to him and needed to be closed (Tabs 4d-2-5, p. 15; 4d-2-7, pp.6, 15). This evidence corroborates Ms.Douglass's testimony and is supportive of the allegations contained in the specifications. The specifications are therefore supported and sustained by substantial evidence.

Specification 8 alleges inefficient work practices regarding Taxpayer C. The specification states that as of April 21, 2005, the case was ready for issuance of an examination report but the appellant did not issue the report until May 31, 2005.

Ms. Douglass verified the accuracy of the specification in her testimony. She stated the appellant told her he did not want to issue an examination report because he would then have to close the case in five days. She found this to be an invalid reason.

The appellant did not deny the statement attributed to him by Ms. Douglas but instead stated in his replies to the proposed removal notice that the case was not ready to close because more information was needed (Agency Exhibit 1, pp. 26, 27; Appellant's Exhibit C6, C7).

Based on Ms. Douglass's uncontested allegation the appellant provided an invalid reason for his refusal to issue an examination report, the allegation contained in the specification is supported by substantial evidence. Because issuance of the examination report would have facilitated processing of the case, the appellant's refusal to issue the report supports the agency's allegation he did not act in a timely manner. The specification, in short, is supported by substantial evidence.

I have found that six of the eight specifications alleging unacceptable performance under standard 5A are supported by substantial evidence. I find these sustained specifications support the agency's allegation the appellant did not work in an efficient and timely manner on his cases. I therefore find the agency has proven the appellant rendered unacceptable performance under performance standard 5A.

Component 5B is also supported by eight specifications. Specification 8, which also supports the charge regarding component 5A, also is cited in support of the charge regarding component 5B. It alleges the appellant's failure to issue the examination report in a timely manner establishes the appellant failed to prioritize, plan, and schedule his work in order of priorities.

Ms. Douglass testified that the forty-two days taken to close this case was too long because the IRS has to suspend interest on an untimely-processed account and, further, the taxpayers wanted the IRS to finalize their action at the earliest possible time.

The appellant responded in his replies that this case was not entitled to any special priority in scheduling (Appellant's Exhibit C7) and that, notwithstanding this circumstance, he charged forty hours to the case in May 2005 (Agency Exhibit 1, p.27).

I have already found the appellant failed to work in an efficient and timely manner regarding this case. This circumstance is also apparently illustrated by the appellant's action in spending more than forty hours of work on the case in May before he finally issued an examination report at the end of the month, when, according to Ms. Douglass, the report could have been issued in April. The appellant's contention that the case was not entitled to priority over other cases does not appear to be meritorious. As Ms. Douglass testified, the taxpayer was entitled to an expeditious decision and, further, interest on such an account may be suspended if the IRS unnecessarily delays processing. Under this circumstance, I find the appellant, by his unjustified failure to more expeditiously process this case, did in fact fail to properly prioritize his work. The specification is therefore supported and sustained by substantial evidence.

Specifications 9-11 concern Taxpayers N. O. and P, as discussed above in Specificatons 5-7 under performance component 5A. Here the agency alleges the appellant's failure to plan and schedule his work in order of priorities is illustrated by his failure to timely close these cases.

As discussed above, Ms. Douglass stated the appellant failed to timely complete action in these cases. She further testified, with particular reference to specifications 9-11, that the appellant did not explain why he failed to close the cases. The appellant responded he properly prioritized these cases (Appellant's Exhibits C7 and C8).

I have already found the appellant did not respond in a timely manner to the instruction of his supervisor to expedite processing of these cases. Because of these instructions, he should have given the cases a higher priority than would otherwise have been the case. I therefore find the specifications are supported and sustained by substantial evidence.

Specification 12 alleges that in the case of Taxpayer E the appellant did not work on his items in order of their priority. The appellant began his work on this case in June 2004. The appellant presented an action plan to his supervisor in March 2005. Although the plan included all the necessary actions to be taken, it was necessary for the supervisor to reprioritize the actions to be taken.

Ms. Douglas testified this case was overage. The appellant, however, did not list the action items in the order of priority. She testified in particular that the first step he should have taken was to obtain other tax returns. In addition, he should have, but did not, list the action items in the order in which they would be taken. Documentary evidence reflects Ms. Douglass met with the appellant on March 3,

2005 but it was necessary for her to suggest the order of priority for the action items listed by the appellant, referencing in particular that examination of the prior tax year was the most immediate priority (Tab 4d-2-12).

The appellant responded that his plan of action was fine and that priorities were reordered after an issue was dropped (Appellant's Exhibit C9).

The agency does not contend the appellant's action items were improper. However, the appellant did not list them in the proper order of priority until meeting with his supervisor. Under this circumstance, he did not properly prioritize this work, and the specification is supported and sustained by substantial evidence.

Specification 13 alleges the appellant failed to prioritize his work inventory during a May 27, 2005 workload review. It was allegedly necessary for the appellant's supervisor to provide an outline of actions to be taken, the order of the actions, and the deadlines to have the actions completed.

Ms. Douglass testified it was necessary for her to set deadlines for the appellant during the workload review. She stated the appellant should have been able to do this himself. Documentation of the May 27 workload review reflects that at the end of the review Ms. Douglass established the proper order in which the items scheduled during the review had to be worked (Tab 4d-2-13).

The appellant stated in his reply that he had prioritized the case items listed during the review and then discussed the priorities with his supervisor (Appellant's Exhibit C9).

In the workload review document, Ms. Douglass stated that no deadline dates were established during the meeting and, that as a result, she was "setting some below." Thus, it appears that Ms. Douglass rather than the appellant established the deadlines for actions to be taken. Accordingly, even if the appellant set priorities, he did not establish a schedule for the work to be timely completed as required by the performance standard. The specification is therefore supported and sustained by substantial evidence.

Specification 14 also alleges the appellant failed to prioritize his work. He began work on the case of Taxpayer F in September 2004. During various reviews and meetings with his supervisor, he discussed the need to issue a summons. During the May 27 review, his supervisor allegedly gave him a specific direction to have a summons issued by June 2, 2005. The appellant, however, failed, as required, to issue a third-party notice so it was necessary to delay issuance of the summons until June 14, 2005.

Documentary evidence verifies that Ms. Douglass advised the appellant on May 27, 2005 to issue the summons by June 2, 2005 (Tab 4d-2-14, p.24). Ms. Douglass testified the appellant failed to issue a third-party notification as required and as he should have known. Moreover, the appellant should have worked on the case within the first forty-five days after he received it, not six months later.

The appellant denied that the case was delayed. He further stated that a third-party notice

was timely prepared and issued (Appellant's Exhibit C9).

The appellant's denial that the case was delayed is rebutted by Ms. Douglass's testimony as well as by documentary evidence. During the March 3, 2005 workload review, Ms. Douglass set an estimated closing date of May 6, 2005 (Tab 4d-2-12, pp. 19, 20). The appellant clearly did not meet this date because it was necessary for Ms. Douglass to subsequently direct the appellant to issue a summons well after the expected May closing date. Although the appellant argues that he timely prepared the third-party notification, the delay in case processing provides support for Ms. Douglass's testimony he failed to act in a timely manner. I therefore find the specification is supported and sustained by substantial evidence.

The agency stated at the hearing that it withdraws specification 15 because it cannot prove it. Accordingly, this specification is not sustained.

I find that the seven sustained specifications are supportive of component 5B of the critical element and that the component is therefore supported and sustained by substantial evidence.

The agency cited five specifications in support of its allegation the appellant failed to meet the requirements of component 5C of the critical element. Specification 16 alleges the appellant did not use "appropriate analytical resources and fact finding or innovative techniques to gather and develop facts." On March 28, 2005, the appellant told his supervisor that the case involving Taxpayer I

would be closed with no adjustments by April 8, 2005. Although the appellant submitted the case for closing on April 7, 2005, the case had to be returned for further development of the issue of a rental property. Even though this issue had been "classified," it was not fully developed as required.

Ms. Douglass testified this case involved a rental property issue and that she had to direct the appellant to ask questions of the taxpayer. She also stated the appellant should have interviewed the taxpayer on his own initiative.

The appellant denied the charge and stated he used appropriate analytical resources and properly gathered facts (Appellant's Exhibit C10).

I previously discussed this taxpayer's case in specification 8 under performance component 2C, finding that the case had to be returned to the appellant because the record was not fully developed. I hereby adopt the findings made in that specification. This record shows the appellant did not properly gather and develop facts pertaining to Taxpayer I and utilize "appropriate analytical resources." For this reason, I find the factual circumstances alleged in the specification are supported by substantial evidence. Because these circumstances are supportive of unacceptable performance under component 5C, I further find that the specification is sustained.

Specification 17 alleges the appellant did not determine the appropriate books and records to review for vehicle expense in the case of Taxpayer C. Although the appellant reviewed a mileage log before

he closed this case, he failed to consider the total miles, business and non-business, that were used when the taxpayer took a deduction for actual vehicle expenses nor did he review any documents to verify the beginning and ending miles.

In her testimony, Ms. Douglass stated the appellant did not, as required, verify the total personal miles used on the vehicle. The July 22, 2005 closed case review regarding this taxpayer notes the appellant did not track the beginning and ending miles driven during the year which could then have been compared to the business miles recorded in the mileage log. Based on these figures, the appellant could have then determined the utilization percentage for both business and personal purposes ((Tab 4d-2-17).

The appellant stated he considered both the personal and business mileage and denied the allegation of unacceptable performance (Appellant's Exhibit C10 and 11). In his oral response, he stated it was not necessary based in part on this interview with the taxpayer, to review the beginning and ending mileage figures (Agency Exhibit 1, p.33).

The appellant apparently does not contest the agency's assumption he would be able to verify the beginning and ending miles on the car. Under that circumstance, the most accurate measure of business and personal usage would be to subtract the business log miles against total mileage and compute the appropriate percentages. I find, under these circumstances, the appellant did not properly gather information and develop facts as required under

performance component 5C. The specification is therefore supported and sustained by substantial evidence.

Specification 18 alleges the appellant did not determine when verbal evidence was the appropriate method of gathering and validating information in the case of Taxpayer B. The taxpayer was married but filed as head of household. Although she had a qualified dependent listed on her tax return, it appeared she lived with her spouse. This taxpayer's return was related to the return of Taxpayer A in Specification 1 of the first charge. As discussed above, it was necessary for the appellant's manager during a workload review to initiate a review of Taxpayer B. The scope of the review was to be limited to filing status only. Even though the taxpayer told the appellant that the child lived with her, the appellant requested formal documentation to support the dependency exemption even though that was not an issue raised in discussions with the appellant's supervisor.

Ms. Douglass stated the above circumstances establish the appellant was not aware when oral evidence could be utilized as a part of the fact-gathering process. The appellant stated that because the "head of household" status was questionable, the dependency exemption itself was questionable, and he therefore requested verification of the dependency status (Appellant's Exhibit C11).

It appears the agency's complaint in this instance was that the appellant gathered facts that were unnecessary to the central issue in the case, the

taxpayer's filing status. Although it can be argued that the appellant's request for documentation that was superfluous to the central issue in the case was improper, I find it does not violate component 5C requiring that he gather and develop facts regarding the case. I therefore find the specification is not supported and sustained by substantial evidence.

Specification 19 alleges the appellant failed to "interpret and follow applicable procedures, guidelines, and standards" in the case of Taxpayer E. On March 23, 2005, he allegedly issued a summons to a third party. The "Service of Summons, Notice, and Recordkeeping Certificates" was not properly completed, however. He should have, but did not, show the name of the taxpayer in the space for the "name of Noticee." In addition, there was no proof he mailed the notice to the taxpayer in that the history sheet of the case does not reflect it was mailed nor did he have a return receipt from the mailing.

Ms. Douglass testified that a summons sometimes has to be enforced. For this reason, it has to be properly completed and served. The appellant, however, sent the summons to the wrong party and he had the wrong name on the summons (Tab 4d-2-19, p.1). Proper notice was therefore not given to the taxpayer and he did not return a signed copy.

The appellant conceded he placed the wrong name on the summons but stated this error was "not substantial" and that he otherwise complied with the proper procedures (Appellant's Exhibit C11). In his oral response, he contends the agency was "trying to

make a mountain out of a molehill" (Agency Exhibit 1, p.34).

As Ms. Douglass testified, a summons must be properly completed in the event it has to be enforced. The appellant did not fulfill this requirement in this case. He therefore failed to follow "applicable procedures, guidelines, and standards " as required under performance component 5C. The specification is therefore supported and sustained by substantial evidence.

Specification 20 alleges the appellant failed to follow applicable guidelines and procedures regarding Taxpayer F. When preparing a summons, he improperly completed Part D by addressing it to the summonsed party rather than the noticees. When the appellant finally issued the summons, the earliest he could inspect the summonsed information was July 7, 2005. The appellant, however, received and inspected the summons information prior to July 7, 2005.

Ms. Douglass stated the appellant's action in this case did not follow the procedures regarding a possible motion to quash the summons in that the noticee was allowed the prescribed time to begin a Summons Quash Proceeding.

The appellant conceded he incorrectly placed the name of the financial institution, rather than the taxpayer, as the noticee. He also admitted that he erroneously inspected the summoned information too early (Appellant's Exhibit C12). He argues, however, that the taxpayer did not petition to quash

the summons so there was no harm (Agency Exhibit 1, p. 35).

Even assuming the end result in this case was not harmful, the appellant's failure to follow

applicable procedures, guidelines, and standards under component 5C could have resulted in harm. The appellant's actions therefore violated a performance requirement of his position. I find, in summary, that the specification is supported and sustained by preponderant evidence.

Specification 21 alleges the appellant failed to interpret Summons Noticee Procedures accurately in the case of Taxpayer G. When he prepared a summons to be issued in this case, he prepared Parts C and D to be given to the noticee and addressed Part D to the taxpayer. It was necessary for the appellant's supervisor to explain to him that there was no need to send the taxpayer a noticee copy when he was the person being summonsed and that Parts C and D are specifically for third-party summonses.

Ms. Douglass testified that the appellant sent a summons as well as notice of the summons to the taxpayer, thus notifying him of quash procedures. She stated it was not necessary to send the taxpayer a noticee copy because he was the party who was summoned.

The appellant stated in his written response that the "taxpayer being summoned is the noticee." He stated he correctly prepared the summons and "did not send them to the taxpayer" (Appellant's

Exhibit C12). In his oral response, the appellant conceded he may have made some "minor inconsequential errors"in regards to issuing a summons" (Agency Exhibit 1, p.37).

There is substantial evidence, based on the testimony of Ms. Douglass and the appellant's admission he may have made some "minor inconsequential errors" in the issuance of the subpoena, that the appellant did not follow all applicable procedures, guidelines, and standards in this case. I therefore find the specification is supported and sustained by substantial evidence.

I have sustained four of the five specifications detailing instances of unacceptable performance under performance component 5C. I find that the sustained specifications support the agency's charge that the appellant's performance under the component was unacceptable. Because I further find the appellant failed to demonstrate acceptable performance in any of the three components under Critical Element V, I find his overall performance under the Critical Element was properly found to be unacceptable.

The agency afforded the appellant a reasonable opportunity to improve his performance. As discussed above, the agency placed the appellant on a performance improvement plan (PIP)(Response File: Tab 4i). The PIP notice explained in detail the nature of his performance deficiencies under Critical Elements II and V. The opportunity period was twice extended and lasted more than four months, from February 22, to July 1, 2005 (Agency Response

File: Tabs 4f and h). During that time, Ms. Douglass and a senior tax agent both worked with the appellant in an attempt to bring his performance to an acceptable level.

Documentary evidence reflects the agency held frequent workload review discussions during the PIP and offered suggestions on ways to improve his performance. Moreover, Ms. Douglass testified the appellant was allowed to carry a relatively low caseload during the PIP and the cases assigned to him were less complex than other cases appropriate for assignment at his grade level.

The appellant complains he should have been told more specifically he was failing the PIP and also that the agency should have provided more specific suggestions for improvement.

The agency's action in twice extending the PIP should have placed the appellant on notice that he had failed to demonstrate acceptable performance within the previously established time frames. Moreover, the workload reviews, as shown in my analysis of the specifications at issue here, should have placed the appellant on notice that his performance remained unacceptable and needed improvement. These reviews, the follow-up workload reviews, and the closed case reviews, all provided the appellant with suggestions on how his performance might be improved. I therefore find the appellant's complaints about the PIP are not meritorious.

The record does in fact establish the agency worked with the appellant over a period of at least four months in an attempt to improve his work

performance to an acceptable level. It only removed him following his demonstrated inability to raise his performance in the two specified critical elements to an acceptable level.

Based on the agency's critique of the appellant's work and its recommendations for improvement at the onset of and during the PIP, the fact the appellant was provided sufficient time to demonstrate acceptable performance, and because the appellant's supervisor often met with him in an attempt to assist him in achieving acceptable performance and a senior tax agent was also assigned to mentor the appellant, substantial evidence establishes the appellant was afforded a reasonable opportunity to improve his performance to an acceptable level before the removal action was taken. *See Sandland v. General Services Administration*, 23 M.S.P.R. at 583, 586-87 (1984).

The appellant has not proven his allegations of race and sex discrimination. The appellant carries the burden of proof on these allegations. 5 C.F.R. § 1201.56(a)(2)(iii) (2005). He may fulfill this burden by either direct or circumstantial evidence. *See George v. U. S. Postal Service*, 74 M.S.P.R. 71, 79, 83 (1997). Direct evidence may consist of documentary or testimonial evidence, including any written or verbal policy or statement made by an employer that "both reflect[s[] directly the alleged discriminatory attitude and bear[s] directly on the contested employment decision." *Id.* An appellant with direct evidence of discrimination will prevail on his discrimination claim if he establishes that one of the improper motivating factors played a part in the

agency's action. *See Arredondo v. United States Postal Service*, 85 M.S.P.R. 113, 120 (2000). Even after a finding of unlawful discrimination based on direct evidence, however, the agency may limit relief by proving by preponderant evidence it would have taken the same action even in the absence of proven discrimination. *Id.*

To establish a claim of discrimination by circumstantial evidence, the employee must first establish a prima facie case consisting of the following elements: that he is a member of a protected group, that he was similarly situated to an individual who was not a member of his protected group, and that he was treated more harshly than that individual. *George*, 74 M.S.P.R. at 83, *citing Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed Cir. 1996)(Table). In order for comparative employees to be similarly situated, all relevant aspects of the appellant's employment situation must be nearly identical to those of the comparative employee. *See Botto v. United States Postal Service*, 75 M.S.P.R. 471, 476-77 (1997), *citing Richard v. Department of Defense*, 66 M.S.P.R 146,153 (1995). For example, the comparative employees must have engaged in work performance similar to the appellant's without differentiating or mitigating circumstances that would distinguish their work performance or the appropriate discipline for it and they must have worked in the same work unit and been disciplined by the same supervisor. *Id.; Sherman v. Runyon*, 235 F.3d 406, 409 (8th cir. 2000). Assuming the

appellant establishes a prima facie case of discrimination, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show the agency's stated reason is merely a pretext for prohibited discrimination. *See Williams v. Department of the Navy*, 99 M.S.P.R. 626, 632 (2005).

The appellant does not allege the existence of any direct evidence of discrimination.[9] Accordingly, he must prove his case by circumstantial evidence.

The appellant did not provide any evidence involving a female comparator. For this reason, he cannot prove, by circumstantial evidence, that his gender played any role in his removal.

The only comparator mentioned by the appellant is Lewis Leeker. He states that Mr. Leeker, a white male who was also employed as a Revenue Agent, was "allowed to be reassigned as a Revenue Agent to a prior job position" whereas he

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[9] [#4 in actual document] In his prehearing submission (Record, Tab 9, Exhibit B), the appellant advances a wide variety of complaints, including his reassignment from another division, an alleged lack of training, and his failure to be selected for other jobs, but he does not provide an offer of direct evidence of discrimination pertinent to the removal action at issue here. During his testimony, he admitted he had no direct evidence of discrimination by his second-level supervisor, Victoria Gally, Territory Manager, who proposed the appellant's removal and who the appellant apparently alleges was the primary source of the alleged discrimination in this case. He stated his case was instead based on circumstantial evidence.

(an African-American male) was not allowed this option (Record, tab 9, Exhibit B, pp. 12, 23).

Ms. Gally stated that Mr. Leeker was employed in a same position as the appellant, a GS-12 Revenue Agent. She stated he was placed on a PIP and that he failed the PIP.[10] He was thereafter downgraded to a GS-11 position in the "money-laundering" group with a last-chance agreement. She stated he had prior training and experience in this group. She stated she was unable to unilaterally place the appellant into this position because it is a "separate business unit." She testified, however, that she personally contacted other Territory Managers in different IRS business units regarding whether the appellant could be reassigned to any of the units but was told there were no job openings and they did not wish to hire the appellant. Faris Fink, Area Manager and the deciding official in this case, stated that, in the case of Mr. Leeker, the National Treasury Employees Union initiated the reassignment action by specifically requesting his reassignment to the money-laundering group. He further testified that in the appellant's case there were no available positions to which he could be reassigned.

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[10] [#5 in actual document] Ms.Gally testified that another white male, Al Akers, was also placed on a PIP. She stated that Mr. Akers, who also was employed as a GS-12 Revenue Agent, was offered and accepted a seasonal position as a GS-8 Customer Service Representative following the PIP. She stated she offered the appellant the same opportunity but that he declined the offer.

The record documenting Mr. Leeker's work record as a GS-12 Revenue Agent is not in this record. Accordingly, I cannot determine if his apparently poor work performance is based on deficiencies of a similar magnitude as those present here. Moreover, the degree of the appellant's familiarity with money-laundering" is not established, in contrast to the evidence showing Mr. Leeker was both experienced and trained in this field, thus facilitating his reassignment. Further, Ms. Gally stated she was unable to reassign the appellant to that position without agreement by that business unit and, as stated above, she was advised by the individuals having authority to make such determinations that no positions were available. For these reasons, the circumstances in Mr. Leeker's case are not substantially similar to those of the appellant. Because the appellant has not shown he was similarly situated to Mr. Leeker, a prima facie case has not been established.

Even assuming the appellant had established a prima case of race discrimination, he cannot prevail. The agency has presented a legitimate, non-discriminatory basis for the appellant's removal, his failure to demonstrate acceptable work performance in two critical elements of his position. Ms. Gally, a white female, Mr. Fink, a white male, and Ms. Douglass, an African-American female, all testified denied that neither the appellant's race nor his gender played any role in their actions. Based on all the evidence presented, I find the appellant cannot show the basis for his removal was merely a pretext f

for discrimination. Accordingly, the appellant's allegations of discrimination are not sustained.

The appellant's allegation of retaliation is not sustained. The appellant alleges that his removal was based in part on retaliation for his prior EEO activity. He stated in his prehearing filings and during his testimony that he filed three EEO complaints from June 2003 to april 2004 (Record, Tab 9, Appellant's Exhibit B, p. 4) and further testified this removal action was issued in retaliation for the complaints. Although he stated in his pleadings (Record, Tab 9, Appellant's Exhibit B, p. 34) that the agency has a copy of the investigative reports regarding the complaints, neither party introduced copies of the reports into the record. Accordingly, the specific nature of the complaints is not evident based on this record.

I will evaluate whether the appellant has met his overall burden of proving retaliation. *See Simien v. United States Postal Service*, 99 M.S.P.R. 237, 249 (2005). In weighing the evidence on this issue, I will examine whether there is a nexus between the protected activities and the disciplinary action as well as whether the intensity of any motive to retaliate overcomes the reasonableness of the agency's action against the appellant. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 624-626 (2001).

Although copies of the complaint investigatory reports are not in this record, at least two of the complaints involved the selection of applicants for

positions. Ms. Douglass testified she was aware of a complaint in which the appellant complained about a selection made by Larry Aikens, an individual not involved in this case. Ms. Gally stated she was aware of two EEO complaints and they both involved selection dedicions for GS-13 positions. She stated she was the selecting official in one of the cases. Ms. Faris stated that although he was generally aware of the appellant's complaints, he did not know the specific nature of the complaints. He further stated he generally does not get involved in EEO cases unless the EEO office contacts him for settlement purposes.

The fact the appellant filed three EEO complaints is not sufficient to establish that agency officials had an intense motive to retaliate against him. Significantly, Ms. Douglass testified that Ms. Gally, who was directly involved in one of the complaints, never discussed the EEO cases with her. Yet Ms. Douglass came to the same conclusion regarding the appellant's work performance, that it was unacceptable. Deciding Official Faris provided unrebutted testimony that he was not even aware of the specific nature of the complaints. Although Ms. Gally had personal knowledge of two of the complaints, she testified that the EEO complaint in which she was the selecting official was ultimately found to be meritless. All three officials denied any retaliation occurred.

Certainly, the agency had a legitimate, non-discriminatory basis to remove the appellant. Many officials, including Ms.Gally, Mr.Fink, Ms. Douglass,

and Mr. Folk, author of the notice of PIP, found the appellant's performance unacceptable in not just one, but two, critical elements. For this reason, the agency had not only a legitimate but also a compelling reason to remove the appellant. The appellant has not shown, under a balancing test, that there was intense retaliatory motive sufficient to overcome the basis for the agency's action. Accordingly, this affirmative defense is not sustained.

The removal action must be affirmed. The appellant failed to prove any of his affirmative defenses. For this reason and because the agency has proven all the required elements of a performance-based action under 5 U.S.C. Chapter 43, the removal action must be affirmed. *See Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1566-67 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____

Stephen E. Manrose
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 19, 2006**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, The EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. §1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov.)

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P. O. Box 19848
Washington, D. C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. §2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C §633a(c).

In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. §2401 (a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

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May 15, 2006
Date

Pamela Bland
Paralegal Specialist

Docket No. CH-0432-06-0273-I-1
Party: Appellant

James A. Buck, Jr.,
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Respectfully submitted,

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